

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF

AUBURN UNIVERSITY
AUBURN-OPELIKA ROBERT G PITTS AIRPORT
AUBURN, T19N, R26E, S2
LEE COUNTY, ALABAMA
EXPIRED NPDES ALR16B632

)
)
) ORDER 10-XXX-CWP
)
)
)
)
)

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter "Department" or "ADEM"), and Auburn University (hereinafter "Operator") pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-16 (2006 Rplc. Vol.), the Alabama Water Pollution Control Act (hereinafter "AWPCA"), Ala. Code §§ 22-22-1 to 22-22-14 (2006 Rplc. Vol.) and the regulations promulgated pursuant thereto, and § 402 of the Federal Water Pollution Control Act, 33 U.S.C. § 1342.

STIPULATIONS

1. The Operator is an Alabama governmental agency which is constructing the commercial development Auburn-Opelika Robert G. Pitts Airport (hereinafter "Facility") located in T19N, R26E, S27, I-85 to East Glenn Avenue to 700 Airport Road, in Auburn, Lee County, Alabama. Sediment and other pollutants in stormwater runoff from the Facility have the potential to discharge and/or have discharged to an unnamed tributary to Moores Mill Creek, a water of the State, classified for Fish & Wildlife, and Swimming and Other Whole Body Water-Contact Sports.

2. The following acronyms are used in this Order and, when used, shall have the meaning of the name or title referenced below.

BMPs	Best Management Practices
NOR	Notice of Registration
NOV	Notice of Violation
NPDES	National Pollutant Discharge Elimination System
QCI	ADEM-recognized Qualified Credential Professional

QCP ADEM-recognized Qualified Credentialed Professional
UT Unnamed Tributary

3. The Department is a duly constituted department of the State of Alabama pursuant to §§ 22-22A-1 to 22-22A-16, Ala. Code (2006 Rplc. Vol.).

4. Pursuant to ADEM Admin. Code r 335-6-12-.11(1), the Operator is required to submit to the Department an NOR in order to register for and obtain NPDES coverage prior to commencing and/or continuing regulated disturbance activities. Under ADEM Admin. Code r. 335-6-12-.05(1), registration is to be maintained until disturbance activity is complete.

5. On October 18, 2006, the Operator submitted to the Department an NOR requesting NPDES coverage under ADEM Admin. Code ch. 335-6-12 for regulated disturbance activities and discharges of treated stormwater from the Facility. The NOR was not complete and the Operator was notified of the deficiencies by phone. On October 28, 2006, the requested information to complete the NOR was submitted by the Operator. The Department granted registration ALR16B632 to the Operator on October 28, 2006. Registration ALR16B632 expired on October 17, 2007.

6. On May 16, 2007, the Operator submitted to the Department an NOR requesting major modification of NPDES coverage ALR16B632. The NOR was not complete and the Operator was notified of the deficiencies by phone. On May 24, 2007, the requested information to complete the NOR modification was submitted by the Operator. The Department granted the modification of ALR16B632 to the Operator on May 24, 2007. Registration ALR16B632 expired on October 17, 2007.

7. On January 22, 2008, the Operator submitted to the Department an NOR requesting re-registration of NPDES coverage ALR16B632. The NOR was incomplete and the Operator was notified of the deficiencies by phone. On February 4, 2008, the requested information to complete the NOR was submitted by the Operator. The Department granted registration of ALR16B632 to the Operator on February 4, 2008. Registration ALR16B632 expired on October 17, 2008.

8. On June 3, 2009, the Operator submitted to the Department an NOR requesting re-registration of NPDES coverage ALR16B632. The NOR was incomplete and the Operator was notified of the deficiencies by phone on June 8, 2009, and by e-mail on June 11, 2009 and September 21, 2009. On October 16, 2009, the requested information to complete the NOR was submitted by the Operator. The Department granted registration of ALR16B632 to the Operator on October 16, 2009. Registration ALR16B632 will expire on October 16, 2010.

9. Pursuant to ADEM Admin. Code r. 335-6-12-.35(10)(a), the Operator is required to determine the nature, amount, and impact of a non-complying discharge, and remove, to the maximum extent practical, sediment and other pollutants deposited offsite or in any State water.

10. During an inspection of the Facility on August 27, 2008, the Department documented that the Operator had not properly implemented and maintained effective BMPs resulting in potential discharges of sediment and other pollutants in stormwater runoff to an UT to Moores Mill Creek in violation of ADEM Admin. Code r. 335-6-12-.35(10)(a).

11. During the August 27, 2008 inspection by the Department, accumulations of sediment resulting from discharges at the Facility were observed offsite.

12. On October 20, 2008, a NOV was sent to the Operator by the Department as a result of the August 27, 2008 inspection. The NOV notified the Operator of deficiencies documented at the Facility, and requested the Operator to submit a report detailing corrective actions certified by a QCP within thirty days of receipt of the NOV. The requested report was received by the Department on November 21, 2008. The report stated the corrective measures taken to address the deficiencies noted in the NOV and stated that Auburn University as well as the QCP were taking active measures to prevent and capture future pollutant laden runoff. Additional information was requested from the Operator via a telephone conversation. The requested information was received by the Department on December 10, 2008.

13. During an inspection of the Facility on February 20, 2009, the Department documented that the Operator had not re-registered for and obtained NPDES coverage, although regulated disturbance activities and/or discharges were continuing.

14. Pursuant to ADEM Admin. Code r. 335-6-12-.35(10)(a), the Operator is required to determine the nature, amount, and impact of a non-complying discharge, and remove, to the maximum extent practical, sediment and other pollutants deposited offsite or in any State water.

15. During the February 20, 2009, inspection by the Department, it was documented that the Operator had not properly implemented and maintained effective BMPs resulting in discharges of sediment and other pollutants in stormwater runoff to a UT to Moores Mill Creek and a UT to Sougahatchee Creek in violation of ADEM Admin. Code r. 335-6-12-.35(10)(a).

16. During the February 20, 2009, inspection by the Department, accumulations of sediment resulting from discharges at the Facility were observed offsite and in a UT to Moores Mill Creek and a UT to Sougahatchee Creek.

17. The Operator consents to abide by the terms of the following Consent Order and to pay the civil penalty assessed herein.

18. The Department has agreed to the terms of this Consent Order in an effort to resolve the violations cited herein without the unwarranted expenditure of State resources in further prosecuting the above alleged violations. The Department has determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

CONTENTIONS

19. Pursuant to Ala. Code § 22-22A-5(18)c. (2006 Rplc. Vol.), in determining the amount of any penalty, the Department must give consideration to the seriousness of the violations, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violations upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty. Any civil penalty assessed pursuant to this authority shall not be less than \$100 or exceed \$25,000 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000. Each day such violation continues

shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. **SERIOUSNESS OF THE VIOLATIONS:** Excessive sediment was allowed to be discharged from the Facility by the Operator. The Operator did not ensure that effective BMPs were fully implemented and maintained resulting in the discharge of pollutants that could otherwise have been prevented and/or minimized. There is no evidence that the noted violations caused harm or irreparable harm to the environment. There is no evidence that the noted violations were a threat to the health or safety of the public.

B. **THE STANDARD OF CARE:** While there are no known operational deficiencies, the Operator failed to keep the Operator's registration coverage current. The Operator did not implement and fully maintain effective BMPs at the Facility. The Operator did not exhibit a standard of care commensurate with applicable regulatory requirements until notified by the Department.

C. **ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED:** The Operator continued to monitor the Operator's discharges and report the results. The Department has been unable to ascertain if there has been a significant economic benefit conferred on the Operator.

D. **EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATIONS UPON THE ENVIRONMENT:** The Operator took little or no action to minimize or mitigate the effects of the noted violations upon the environment. The noted violations appeared to cause little or no effect on the environment.

E. **HISTORY OF PREVIOUS VIOLATIONS:** The Operator has a history of previous violations as described in the Stipulations.

F. **THE ABILITY TO PAY:** The Operator has not alleged an inability to pay the civil penalty.

G. **OTHER FACTORS:** Generally the violations fell into four broad categories of 1) failure to maintain registration, 2) sediment deposition/accumulation off-site, 3) instream deposition/accumulation of sediment, and 4) failure to implement and maintain effective BMPs

which have historically received penalty amounts of 1) \$100.00 to 10,000.00 per day, 2) \$100.00 to \$10,000.00 per day, 3) \$100.00 to \$10,000.00 and 4) \$100.00 to \$5,000.00 per day.

H. It should be noted that this Special Order by Consent is a negotiated settlement and, therefore, the Department has compromised the amount of the penalty the Department believes is warranted in this matter in the spirit of cooperation and the desire to resolve this matter amicably, without incurring the unwarranted expense of litigation.

ORDER

Therefore, the Operator, along with the Department, desires to resolve and settle the compliance issues cited above. The Department has carefully considered the facts available to the Department and has considered the six penalty factors enumerated in Ala. Code § 22-22A-5(18)c. (2006 Rplc. Vol.), as well as the need for timely and effective enforcement, and the Department believes that the following conditions are appropriate to address the violations alleged herein. Therefore, the Department and the Operator agree to enter into this Consent Order with the following terms and conditions:

A. The Operator agrees to pay to the Department a civil penalty in the amount of \$20,000.00 in settlement of the violations alleged herein within forty-five days from the effective date of this Consent Order. Failure to pay the civil penalty within forty-five days from the effective date may result in the Department's filing a civil action in the Circuit Court of Montgomery County to recover the civil penalty.

B. The Operator agrees that all penalties due pursuant to this Consent Order shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel
Alabama Department of Environmental Management
PO Box 301463
Montgomery, Alabama 36130-1463

C. The Operator agrees to take immediate action to prevent, to the maximum extent practicable, sediment and other pollutants in stormwater leaving the Facility and prevent noncompliant and/or unpermitted discharges of pollutants to waters of the State.

D. The Operator agrees that, within five days of receipt of this Order, the Operator shall have a QCP perform a comprehensive inspection of the Facility, offsite conveyances, and affected State waters.

E. The Operator agrees that, within 10 days of receipt of this Order, the Operator shall submit to the Department a CBMPP, prepared/certified by a QCP, detailing effective BMPs that meet or exceed the technical standards outlined in ADEM Admin. Code chap. 335-6-12 and the Alabama Handbook.

F. That, within thirty days of receipt of this Order, the Operator shall fully implement effective BMPs, designed by a QCP, that meet or exceed the technical standards outlined in the Alabama Handbook, the site CBMPP plan, and ADEM Admin. Code chap. 335-6-12, and correct all deficiencies at the Facility and offsite conveyances, including sediment removal or remediation.

G. That, within seven days of the completion of the activities required in F above, the Operator shall submit to the Department a certification signed by the QCP that effective BMPs that meet or exceed the technical standards outlined in the Alabama Handbook, the site CBMPP plan, and ADEM Admin. Code chap. 335-6-12 have been implemented, all deficiencies have been corrected, and full compliance with the requirements of ADEM Admin Code chap. 335-6-12 has been achieved at the Facility, offsite conveyances, and affected State waters.

H. The Operator agrees that, after the effective date of this Consent Order, it shall pay stipulated penalties for each day it fails to meet any of the milestone dates or to satisfy any of the requirements set forth in or established by paragraphs A, C, D, E, F, and G contained herein or any other requirement date, except for *Force Majeure* acts as hereinafter defined, shall be as follows:

Period of Noncompliance	Penalty per Day per Violation
1 st to 30 th day	\$100
31 st to 60 th day	\$200
After 60 days	\$300

If the Operator fails to meet any milestone or any assigned date for a period of ninety days after any required date described in paragraphs A, C, D, E, F, and G then the Department reserves the right to file a new action against the Operator.

I. The Department and the Operator (hereinafter collectively “the Parties”) agree that the cumulative stipulated penalties described in Paragraph H above shall under no circumstances exceed \$12,000.00. Once stipulated penalties of \$12,000.00 are due to the Department and violation(s) continue to occur, then the Department shall be free to issue additional orders or to file suit against the Operator in the Circuit Court of Montgomery County or in another court of competent jurisdiction to enforce compliance of this Consent Order.

J. The Operator agrees to submit payment of stipulated penalties, as described in Paragraph K, to the Department so that they are received by the Department no later than thirty days following the completion of the milestone or requirement. Notification to the Operator by the Department of the assessment of any stipulated penalty is not required.

K. The Parties agree that this Consent Order shall apply to and be binding upon both parties, their directors, officers, and all persons or entities acting under or for them. Each signatory to this Consent Order certifies that he or she is fully authorized by the party he or she represents to enter into the terms and conditions of this Consent Order, to execute the Consent Order on behalf of the party represented, and to legally bind such party.

L. The Parties agree that, subject to the terms of these presents and subject to provisions otherwise provided by statute, this Consent Order is intended to operate as a full resolution of the violations which are cited in this Consent Order.

M. The Operator agrees that the Operator is not relieved from any liability if the Operator fails to comply with any provision of this Consent Order.

N. For purposes of this Consent Order only, the Operator agrees that the Department may properly bring an action to compel compliance with the terms and conditions contained herein in the Circuit Court of Montgomery County. The Operator also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, the Operator shall be limited to the defenses of *Force Majeure*, compliance with this Agreement and physical impossibility. A *Force Majeure* is defined as any event arising from causes that are not foreseeable and are beyond the reasonable control of the Operator, including the Operator's contractors and consultants, which could not be overcome by due diligence (i.e., causes which could have been overcome or avoided by the exercise of due diligence will not be considered to have been beyond the reasonable control of the Operator) and which delays or prevents performance by a date required by the Consent Order. Events such as unanticipated or increased costs of performance, changed economic circumstances, normal precipitation events, or failure to obtain federal, state, or local permits shall not constitute *Force Majeure*. Any request for a modification of a deadline must be accompanied by the reasons (including documentation) for each extension and the proposed extension time. This information shall be submitted to the Department a minimum of ten working days prior to the original anticipated completion date. If the Department, after review of the extension request, finds the work was delayed because of conditions beyond the control and without the fault of the Operator, the Department may extend the time as justified by the circumstances. The Department may also grant any other additional time extension as justified by the circumstances, but the Department is not obligated to do so.

O. The Parties agree that the sole purpose of this Consent Order is to resolve and dispose of all allegations and contentions stated herein concerning the factual circumstances referenced herein. Should additional facts and circumstances be discovered in the future concerning the Facility which would constitute possible violations not addressed in this Consent Order, then such future violations may be addressed in Orders as may be issued by the Director, litigation initiated by the Department, or such other enforcement action as may be appropriate, and the Operator shall not object to such future Orders, litigation or

enforcement action based on the issuance of this Consent Order if future orders, litigation or other enforcement action address new matters not raised in this Consent Order.

P. The Parties agree that this Consent Order shall be considered final and effective immediately upon signature of all parties. This Consent Order shall not be appealable, and the Operator does hereby waive any hearing on the terms and conditions of same.

Q. The Parties agree that this Consent Order shall not affect the Operator's obligation to comply with any federal, State, or local laws or regulations.

R. The Parties agree that final approval and entry into this Consent Order are subject to the requirements that the Department give notice of proposed penalty Orders to the public, and that the public have at least thirty days within which to comment on the Consent Order.

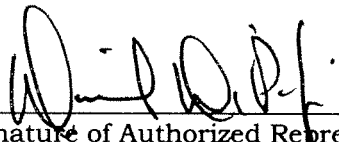
S. The Parties agree that, should any provision of this Consent Order be declared by a court of competent jurisdiction or the Environmental Management Commission to be inconsistent with federal or State law and therefore unenforceable, the remaining provisions herein shall remain in full force and effect.

T. The Parties agree that any modifications of this Consent Order must be agreed to in writing and signed by both parties.

U. The Parties agree that, except as otherwise set forth herein, this Consent Order is not and shall not be interpreted to be a permit or modification of an existing permit under federal, State or local law, and shall not be construed to waive or relieve the Operator of the Operator's obligations to comply in the future with any permit coverage.

Executed in duplicate with each part being an original.

AUBURN UNIVERSITY


(Signature of Authorized Representative)

DAVID DiPOFI
(Print Name of Authorized Representative)

DIRECTOR OF DESIGN & CONSTRUCTION
Title

Date Signed: 11/6/09

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

Onis "Trey" Glenn, III
Director

Date Signed: _____